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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

MARY ANN SUSSEX; MITCHELL PAE;
 MALCOLM NICHOLL and SANDY
 SCALISE; ERNESTO VALDEZ, SR. and
 ERNESTO VALDEZ, JR; JOHN
 HANSON and ELIZABETH HANSON,

Plaintiffs,

v.

TURNBERRY/MGM GRAND TOWERS,
 LLC, a Nevada LLC; MGM GRAND
 CONDOMINIUMS LLC, a Nevada LLC;
 THE SIGNATURE CONDOMINIUMS,
 LLC, a Nevada LLC; MGM MIRAGE, a
 Delaware Corporation; TURNBERRY/
 HARMON AVE., LLC, a Nevada LLC;
 and TURNBERRY WEST REALTY, INC.,
 a Nevada Corporation,

Defendants.

Case No. 2:08-cv-00773-RLH-PAL

**MOTION FOR
 DETERMINATION OF NON-
 ARBITRABILITY OF CLAIMS
 AGAINST NON-SIGNATORY
 DEFENDANTS**

1 The defendants hereby move the Court to clarify its order of June 16,
 2 2009, to confirm that the non-signatory defendants — MGM Grand
 3 Condominiums LLC, The Signature Condominiums LLC, MGM Mirage,
 4 Turnberry/Harmon Ave., LLC, and Turnberry West Realty, Inc. (hereinafter the
 5 "NS5 defendants") — are not compelled to arbitrate plaintiffs' claims under
 6 Section 24.10 of the Purchase and Sale Agreements between the plaintiffs and
 7 Turnberry/MGM Grand Towers, LLC who are the parties to the Agreements.
 8 The motion is based on the papers and pleadings on file, the attached exhibit, and
 9 the following points and authorities.

10 I. INTRODUCTION

11 On July 17, 2008, defendants Turnberry/MGM Grand Towers, LLC
 12 ("Turnberry/MGM") and Turnberry/Harmon Ave., LLC ("Turnberry/Harmon"),
 13 together with two former defendants — MGM Grand, Inc. and Turnberry
 14 Associates — moved the Court to compel arbitration. *See* Motion to Compel
 15 Arbitration (# 17). This motion was initially denied by the Honorable Peggy A.
 16 Leen. Order (# 43) and Memorandum of Decision (# 46). On June 16, 2009, this
 17 Court "overruled, reversed, and vacated" the order and decision, sustained the
 18 moving defendants' objection, and compelled the *Plaintiffs* to arbitrate their
 19 claims. Order (# 59) at 2.

20 On August 31, 2009, the Plaintiffs here and twelve additional
 21 claimants filed a demand for arbitration with the American Arbitration
 22 Association against Turnberry/MGM, MGM Grand Condominiums LLC, The
 23 Signature Condominiums LLC, MGM Mirage, Turnberry/Harmon Ave., and
 24 Turnberry West Realty, Inc. (collectively "Defendants" or "respondents in
 25 arbitration"). Respondents filed an answering statement on October 9, 2009. The
 26 parties have not yet selected an arbitrator.

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II. ARGUMENT

A. The Court has Jurisdiction to Decide the Question of Arbitrability.

"The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Commc's. Workers*, 475 U.S. 643, 649 (1986)) (emphasis added); accord *Carpenters 46 N. Cal. Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410, 414 (9th Cir. 1996) (citing to *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) ("The question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator"); see also 9 U.S.C. § 4 ("If the making of an arbitration agreement is at issue, the court shall proceed summarily to the trial thereof") (emphasis added). This is because "arbitration is a matter of contract"; an arbitrator only has authority to decide a dispute if the parties agreed that he or she has the authority to do so. *Howsam*, 537 U.S. at 83.

Here, the parties to the arbitration agreement did not "clearly and unmistakably provide" that the arbitrator could decide issues of arbitrability, nor did the NS5 defendants otherwise permit the arbitrator — who remains to be selected — to do so. Thus the issue is properly before the Court.

B. There Are No Principles of Contract or Agency Law Requiring the Non-signatory Defendants to Arbitrate Plaintiffs' Claims Against Turnberry/MGM.

Non-signatories to an arbitration agreement cannot be compelled to defend against claims in arbitration except under principles of contract and agency law. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986). Although courts have recognized five principles to compel non-signatories to arbitrate their claims — *i.e.*, "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter

ego; and 5) estoppel," *Comer*, 436 F.3d at 1101 — none of these principles apply here.

Only defendant/respondent in arbitration Turnberry/MGM is a party to the Condominium Unit Purchase and Sale Agreements ("PSAs") that contain the arbitration agreement. Motion to Compel Arbitration (# 17), Ex. C thereto at 1. None of the NS5 defendants is incorporated into the arbitration agreement by reference, nor has any NS5 defendant assumed obligations under the PSA. Plaintiffs do not allege that the NS5 defendants are each other's agents, nor do they plead facts to support alter ego allegations.¹ Although the Plaintiffs will likely argue — as the *KJH* plaintiffs have done in the related state court case — that the NS5 defendants are estopped from refusing to submit to arbitration, this argument fails for several reasons.

1. The NS5 Defendants Did Not Knowingly Exploit the PSAs.

Estoppel requires the "knowing exploitation" of the agreement in which the arbitration agreement appears. *Comer*, 436 F.3d at 1101 (internal citation omitted). Like the appellant in *Comer*, Plaintiffs cannot meet this "insurmountable hurdle . . ." because the NS5 defendants "did not seek to enforce the terms of the [PSAs], nor otherwise to take advantage of them." *Id.* at 1102. The NS5 defendants are merely *defending* against Plaintiffs' claims, which ignore and plead around the PSAs. Compare *Int'l Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000) (non-signatory buyer was estopped from refusing to arbitrate under

¹ Plaintiffs' complaint does not plead *any* facts or conduct to support any of the conclusory allegations made against the NS5 defendants, Compl. (# 14), ¶ 21, and would not sustain against a motion to dismiss for failure to state a claim. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1410-11 (9th Cir. 1996) (affirming dismissal of claims under Fed. R. Civ. P. 9(b)); *G.K. Las Vegas Limited P'ship v. Simon Prop. Group, Inc.*, 460 F. Supp. 2d 1246, 1258 (D. Nev. 2006) (dismissing plaintiff's securities fraud claim under NRS 90.570 for failure to plead particular facts pertaining to individual defendants).

1 the contract that he sued on). The mere fact that the *Sussex* motion to compel
 2 arbitration recites a number of PSA terms in the fact section does not mean that the
 3 moving defendants argued, relied on, or took advantage of these terms. *Accord*
 4 *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 218, 92 Cal. Rptr. 3d 534, 541 (2009)
 5 (distinguishing between making a reference to an agreement with an arbitration
 6 clause and relying on its terms); *compare Int'l Paper*, 206 F.3d at 418 ("a party may
 7 be estopped . . . when he has consistently maintained that other provisions of the same
 8 contract should be enforced to benefit him") (emphasis added).

9 **2. *The NS5 Defendants Did Not Consent to Defend Against***
 10 ***Plaintiffs' Claims in Arbitration.***

11 By joining in Turnberry/MGM's motion to compel *Plaintiffs* to
 12 arbitrate, defendant Turnberry/Harmon did not consent to submit to arbitration.
 13 The moving defendants only sought an order compelling *the Plaintiffs* to arbitrate
 14 under their agreement to which they and only Turnberry/MGM are the parties,
 15 and asked the Court to stay the judicial proceedings. Motion to Compel
 16 Arbitration (# 17) at 21. *Compare*, that a stay may be "advisable . . . among the
 17 *nonarbitrating parties* pending the outcome of the arbitration." *Moses H. Cone*
 18 *Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 n. 23 (1983) (emphasis
 19 added).

20 **3. *Only Turnberry/Harmon Joined in the Motion to Compel***
 21 ***Arbitration.***

22 Even assuming joining in a motion to compel arbitration can pull a
 23 non-signatory defendant into arbitration, Turnberry/Harmon is the only present
 24 defendant/respondent in arbitration who joined in the motion to compel
 25 arbitration, Motion to Compel Arbitration (# 17) at 1, and why shouldn't it?² The
 26 complaint is based on a contract that is subject to an arbitration with

27 ² Plaintiffs mistakenly suggest elsewhere that all NS5 defendants joined in
 28 Turnberry/MGM's motion to compel arbitration. *See, e.g., Demand for*
Arbitration, Ex. A hereto, at 2 (exhibits to Demand omitted).

Turnberry/MGM. Turnberry/Harmon did not contract with plaintiffs, yet they sued this entity on the contract. By joining with the defendant that is subject to arbitration to compel the plaintiffs to arbitrate against the Seller under the PSA does not turn a third party into a co-Seller and thus subject to arbitrate under Section 24.10. By asking the Court to compel the plaintiffs to arbitrate under their contract with the proper party does not make an improperly named defendant a contracting party. *AT&T Techs., Inc. v. Commc's. Workers*, 475 U.S. 643, 648 (1986) (holding that arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (internal citation omitted). None of the other non-signatory defendants joined in the motion, *id.*, and therefore none of them can be estopped on that basis.

4. Plaintiffs are Estopped from Arguing Estoppel.

A party seeking an equitable remedy must come into Court with clean hands, or the equitable remedy may be refused. *United States v. Ga.-Pac. Co.*, 421 F.2d 92, 103 (9th Cir. 1970). Plaintiffs' hands are not clean. Plaintiffs specifically attempted to defeat arbitration on the basis of the NS5 defendants' non-signatory status. See Opposition to motion to compel arbitration (# 22) at 2 n. 2 (arguing that "Defendants fail . . . to show that all Defendants are even parties to the contract and subject to the arbitration clause"). As Plaintiffs argued there:

... even if the arbitration provision were enforceable . . . the provision could only be enforced by Turnberry/MGM . . . *and Plaintiffs' claims against the other five Defendants . . . would nevertheless proceed in this Court because they are not subject to any arbitration clause.* See *Tracer Research, Inc. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994).

Id. (emphasis added).³

³ This is not the only showing of Plaintiffs' attempt to avoid arbitration. Plaintiffs' complaint pleads around the PSA (and the arbitration provision it contains) by asserting tort claims. See Amended Federal Class Action Complaint (# 14) at 1-2. And although the complaint names the NS5 defendants, Plaintiffs fail to plead a single fact to support their conclusory allegations against them. *Id.* at 8-10 (¶ 21).

1 Plaintiffs cannot now claim that their "claims against the other five
2 Defendants [should *not*] proceed in this Court [even though] they are not subject
3 to any arbitration clause."

4 **III. CONCLUSION**

5 The Court should exercise its jurisdiction and discretion to
6 determine that the Plaintiffs' claims against Turnberry/MGM are not subject to
7 arbitration against third parties.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada
Electronic Filing Procedures, I certify that I am an employee of MORRIS
PETERSON, and that the following documents were served via electronic service:
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AGAINST NON-SIGNATORY DEFENDANTS**

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DATED this 21ST day of October, 2009.

By: J. Hickerson